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In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 642

EDWARD BOYKIN, JR.,

PETITIONER

vs.

STATE OF ALABAMA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA
BRIEF AND ARGUMENT OF RESPONDENT

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BRIEF AND ARGUMENT ON THE MERITS BRIEF AND ARGUMENT OF RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Supreme Court of Alabama is reported as follows:

Edward Boykin, Jr., v. State, 1st Div. 403, 207 So. 2d 412, 416. The decision of the Honorable Court granting Certiorari is reported at 21 L. Ed. 2d 93.

II

JURISDICTION

The petitioner has been granted a writ of certiorari from the Supreme Court of the United States to review the judg-

ment of the Supreme Court of Alabama, rendered on February 8, 1968; rehearing was denied March 7, 1968, 207 So. 2d 412, 416. Petitioner applied under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTIONS PRESENTED

1. Does imposition of the death penalty upon conviction for robbery violate the Eighth and Fourteenth Amendments?

2. Did the trial court fail to protect petitioner's right to due process with regard to his plea of guilty?

3. Does the finding of guilty and punishment within the limits set by the statute violate due process in the absence of a statute providing for separate juries to render verdicts and assess punishment?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Eighth Amendment to the Constitution of the United States.

V

STATEMENT

The petitioner was tried and convicted in the Circuit Court of Mobile County, Alabama, of robbery.

The record discloses that defendant was represented by court-appointed counsel and pleaded guilty to five separate indictments charging him with committing five separate

robberies respectively. Jury verdict was guilty of robbery, as charged in the indictment, on his plea of guilty and finding that he suffer death by electrocution. Sentence of death by electrocution was pronounced by the Court (R. pp. 6-8).

VI

SUMMARY OF ARGUMENT

Imposition of the death penalty upon conviction for robbery is not cruel and unusual punishment violative of the Eighth and Fourteenth Amendments when the sentence is within the limits set by State statute.

There is no requirement of affirmatively showing that the trial judge did not accept a plea of guilty until after determining that the plea was voluntarily and knowingly entered by the defendant and that the defendant fully realized and was competent to know the consequences of such a plea.

The finding of guilty and setting punishment by the same jury, in the absence of a statute providing for separate juries for each of these functions, does not violate due process.

VII

ARGUMENT

Petitioner argues at some length that the imposition of the death penalty upon conviction of robbery is cruel and unusual punishment violative of the Eighth and Fourteenth Amendments.

Title 14, Section 415, Code of Alabama 1940, provides that "any person convicted of robbery, shall be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years."

Robbery is a common law crime and is the felonious taking of money, or goods of value from the person of another,

or in his presence, by violence to his person, or by putting him in fear. There is no statutory robbery in Alabama, and the State of Alabama adopted the common law of England, where not inconsistent with the Constitution, laws and institutions of this State, to continue in force until altered or repealed by the Legislature (Title 1, Section 3, Code of Alabama 1940).

The Supreme Court of Alabama in affirming the case now on certiorari to this Honorable Court, *Edward Boykin, Jr., v. State of Alabama*, 207 So. 2d 412, 416, held:

> "Robbery, from the earliest times, has always been regarded a crime of the gravest character. At common law the punishment for robbery was death, with or without benefit of clergy, according to varying statutes. Franklin v. Brown, 73 W. Va. 727, 729, 81 S. E. 405, L.R.A. 1915C 557. In Laws of Alabama, 1823, page 207, the punishment for robbery was death. In the Code of 1852, § 3104, page 563, punishment was ten years' imprisonment. Since the Revised Code of 1867, § 3668, any person convicted of robbery, must be punished, at the discretion of the jury, either by death, or by imprisonment for not less than ten years; or, as in Code 1886, § 3742, by death or by imprisonment for not less than five years; or, as in Code 1896, § 5479, and subsequent codes, by death or by imprisonment for not less than ten years."

This Honorable Court in *Weems v. United States*, 217 U.S. 349, 54 L. Ed. 793, 30 S. Ct. 544, discussed cruel and unusual punishment, holding;

> "What constitutes cruel and unusual has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous,—torture and the like.
>
> . . . . . .
>
> "This court's final commentary was that 'difficulty would attend the effort to define with exactness the extent of

the constitutional provision which provides that cruel and unsual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that Amendment to the Constitution. Cooley, Const. Lim. 4th ed. 408; Wharton, Crim. Law, 7th ed. § 3405.'

"That passage was quoted in Re Kemmler, 136 U.S. 436, 447, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930, and this comment was made: 'Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, and something more than the mere extinguishment of life.' The case was an application for habeas corpus, and went off on a question of jurisdiction, this court holding that the 8th Amendment did not apply to state legislation. It was not meant in the language we have quoted to give a comprehensive definition of cruel 371] and unusual *punishment, but only to explain the application of the provision to the punishment of death. In other words, to describe what might make the punishment of death cruel and unusual, though of itself it is not so. It was found as a fact by the state court that death by electricity was more humane than death by hanging."

As was pointed out earlier the statutory punishment in Alabama upon conviction of robbery is punishment, at the discretion of the jury, by death, or imprisonment in the penitentiary for not less than ten years.

Where the sentence imposed is within the limits prescribed by statute for the offense committed, it ordinarily will not be regarded as cruel and unusual. *U. S. v. Sorcey*, 151 F. 2d 899, Cert. Den. 66 S. Ct. 821, 327 U.S. 794, 90 L. Ed. 1021.

It is noted that the cases set out in Appendix "B" of amicus curiae brief, *In Re Robert Page Anderson*, Crim. 11572 and *In Re Frederick Saterfield*, Crim. 11573, disagree with the petitioner's contentions. There the majority opinion held:

"The fixing of penalties for crime is a legislative function. What constitutes an adequate penalty is a matter of legislative judgment and discretion and the courts will not interfere therewith unless the penalty prescribed is clearly and manifestly cruel and unusual.' (People v. Tanner, 3 Cal. 2d 279, 298; People v. Keller, 245 Cal. App. 2d 711, 714-715.) In Trop v. Dulles, supra (1958) 356 U.S. 86, 99 (plurality opinion), which concluded that denationalization for wartime desertion constituted a cruel and unusual punishment within the meaning of the Eighth Amendment, it was stated, '[L]et us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

The same case held that, "Since every person charged with the offense has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the statute."

Respondent respectfully submits that this adequately explains away any possible contention that a code section is unconstitutional because of vagueness in allowing the jury to assess punishment without mention of standards for the exercise of that discretion.

Petitioner places some reliance on *Giaccio v. Pennsylvania*, 382 U.S. 399, 15 L. Ed. 2d 447, 86 S. Ct. 518, wherein

a statute permitting a jury to assess costs against an acquitted defendant was held constitutionally invalid because of vagueness and the absence of any standards sufficient to enable a defendant to protect himself against arbitrary and discriminatory imposition of costs. However, this Honorable Court held in footnote 8:

> "In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice in many states to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits."

Alabama has had the practice in robbery trials of the jury finding the verdict and fixing the punishment within the limits set out by the Code for many years. Respondent submits that such procedure is not violative of any constitutional rights of the accused.

What group is better able to arrive at the correct amount of punishment than the jury which heard the evidence, had been afforded the opportunity to see and hear the witnesses and pass on their credibility, and from the evidence determine the gravity of the crime and whether the accused is guilty. It is obvious that the same jury which heard the evidence and returned the verdict is in better position to fix the punishment as befits the gravity of the offense than a jury who merely is called in to fix punishment.

As usual in cases where the defendant is a Negro, effort has been made to show racial discrimination in the giving of the death penalty in cases of robbery convictions. Figures are cited which disclose that 5 Negroes were executed for robbery in Alabama from 1932 to 1962 and another set that 5 Negroes were executed from 1932 to 1967 and no whites. Respondent points out that only one person has been executed in Alabama for robbery in the last six years. James W. Coberly, a white man, was executed on September 4, 1964. No Negroes were executed for robbery during that period.

The principal objectives served by punishing an individual for commission of a crime are (1) punishment of the individual for commission of the crime (2) rehabilitation where in order, and (3) deterrence of others from commission of such crime.

Granted that the death penalty is the maximum punishment, and, of course, does away with any rehabilitation of that particular criminal, the deterrent factor is very important.

This case now before this Honorable Court is a fine example of such conviction and legal sentence serving as a deterrent to robbery in a city. Mobile had just experienced a series of such robberies and storekeepers were aroused and were arming themselves to defend their property and put an end to this reign of terror by lawless individuals. After the trial and conviction of Edward Boykin, Jr. the deterrent effect was a cessation of such robberies.

Petitioner, in his brief, has pointed out that there was a violent death as a result of the robbery in *Cobern v. State*, 278 Ala. 547, 142 So. 2d 869. That is true. Cobern killed his victim. The State of Alabama had two indictments against Cobern—one for murder and one for robbery. Because the victim was the girl friend of Cobern, a married man, there was a possibility that a good trial attorney would get Cobern off with a second degree murder or manslaughter conviction. The State prosecuted the robbery case and Cobern was convicted, sentenced to death and executed on September 4, 1964.

The people of Alabama and most of the rest of the people of the United States regard robbery as a very serious crime. Alabama regards it as a capital offense.

Respondant disagrees with petitioner that legislation should be enacted to change the sentence imposed upon the one convicted of robbery.

The present law provides a minimum punishment of ten years and permits a greater sentence up to the death penalty in aggrayated cases where there is serious injury or disregard for human life. Boykin shot one little girl and showed a flagrant disregard for human life by firing into the stores when leaving. He and the people of Mobile are fortunate that he did not kill anyone.

Seldom does one encounter a weaker case than this one on behalf of abolition of the death penalty. He should be punished. Rehabilitation is out of the question. His legal execution will serve as a deterrent to those who regard such things as robbery, arson, looting, etc. as a way of life and an exercise of their "rights."

Petitioner argues that the trial court erred in accepting the guilty plea without first ascertaining whether or not a guilty plea was voluntarily made.

> "Rule 11 of the Federal Rules of Criminal Procedure provides that the court 'may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge.' While no particular ritual need be observed by the trial court, such as a formal finding or recitation that the plea was entered with understanding, an affirmative duty nonetheless exists on the part of the trial court to advise the accused fully and not merely perfunctorily as to what acts are necessary to establish guilt, and to do all it can to make reasonably certain that a plea of guilty represents the free and voluntary act of one who fully understands the nature of the charge and the consequences of his plea. . . ."
> *Hulsey v. United States*, 369 F. 2d 284 (1966).

97 A. L. R. 2d, pages 556, 557, state that the trial court is not relieved of the duty of ascertaining the consequences of his plea and of advising him of such consequences if he is

not so informed, even if the defendant is represented by counsel. Among the cases cited thereunder is *Bullock* v. *Harpole*, 233 Miss. 436, 102 So. 2d 687, which held:

"[2,3] In answer to that contention, we say that it was the duty of the Circuit Court of George County, before accepting the appellant's plea of guilty in this case, to determine that the applicant entered the plea of guilty freely and voluntarily, and that he was competent to know and understand the consequences of his act. But we have no statute which requires that the judgment of the court contain a finding that these rules of procedure have been complied with before such plea of guilty can be accepted and final judgment entered thereon. The judgment itself raises a presumption that what ought to have been done by the trial judge with respect to receiving such plea was done; and, in the absence of any showing to the contrary, we must assume that the trial judge saw to it that the plea was voluntary, and that the defendant fully realized, and was competent to know the consequences of such plea. State v. Hill, 81 W. Va. 676, 95 S.E. 21, 6 A.L.R. 687. ... ."

Alabama has no explicit statutory requirements as to the trial court's duty to admonish the defendant of the consequence of his plea of guilty as have Colorado, Illinois, Texas and others. The duty of the trial court in Alabama is set out in Title 15, Section 277, Code of Alabama 1940, as follows:

"§ 277. When prisoner pleads guilty.—If he pleads guilty, no special venire need be drawn, but the court must cause the punishment to be determined by a jury, except where the punishment is by law required to be fixed by the court, and may, in all cases which a plea of guilty is entered, cause witnesses to be examined, to ascertain the character of the offense."

Justice Lawson, concurring specially in this case, held as follows:

"I am not familiar with any holding of this court to the effect that when a defendant pleads guilty in a capital case the record must affirmatively show that the trial judge did not accept the guilty plea until after determining that the plea was voluntarily and knowingly entered by the defendant and that the defendant fully realized and was competent to know the consequences of such a plea. And such is not, in my opinion, the holdings of the Mississippi Supreme Court in Dickinson v. State, 202 Miss. 804, 32 So. 2d 881, and Yates v. State, 251 Miss. 376, 169 So. 2d 792, cited and relied upon in the dissenting opinion.

"In Howard v. State (Ala. Sup. Ct.), 194 So. 2d 834, in reviewing the action of a trial court in a post conviction proceeding, we observed: 'An accused's plea of guilty may be accepted only if it is made voluntarily and knowingly. If it appears that a guilty plea is the product of coercion, either mental or physical, or was unfairly obtained or given through ignorance, fear or inadvertance, it is void since it is a violation of constitutional safeguards.' (194 So. 2d, 837-838). In my opinion the language just quoted is to the same effect as that quoted in the dissenting opinion from Yates v. State of Mississippi, supra.

"Of course, a trial judge should not accept a guilty plea unless he has determined that such a plea was voluntarily and knowingly entered by the defendant. But neither the Howard case, supra, nor the Mississippi cases, supra, hold that the record must affirmatively show that the trial judge made such a determination. The effect of the dissenting opinion is to presume that the trial judge failed to do his duty.

"If the trial court did fail to make such an ascertainment, or if the appellant, Boykin, was not adequately represented in the court below, or if because of his youth or ignorance he was unable to fully comprehend the possible effect of having all five cases tried before the same unstruck jury, he can raise any or all of those questions in a petition or writ of error coram nobis. In such a proceeding, of course, the petitioner would be required to produce evidence in support of his contentions. But, in my opinion, there is nothing in this record which would justify a reversal of any of those possible contentions."

It is respectfully pointed out that the petitioner had court-appointed counsel, Evan Austil (R. p. 3). The cases cited by petitioner having to do with waiver of counsel are inapplicable. Also, an attempt to put a Miranda tag on this case is not applicable. *Miranda v. Arizona*, 384 U.S. 436, had to do with constitutional warnings prior to questioning a suspect to get him to confess to a crime.

As the Supreme Court of Alabama pointed out if the trial court failed to ascertain the voluntariness of the plea, or if defendant failed to comprehend the effect of all five cases being tried before an unstruck jury, or if he considered counsel inadequate, he could raise these points on coram nobis. Title 15, Section 318 (1-12), Code of Alabama 1940, as amended, provides for appointed counsel on such hearings. Also, federal habeas corpus is available and the District Judge always appoints counsel for such hearings.

The Supreme Court of Alabama, under the Automatic Appeal Statute, Title 15, Section 382(1-13), Code of Alabama 1940, as amended, is required to carefully examine record for any reversible error, whether called to their attention or not. They found none and affirmed the case.

VIII

CONCLUSION

For the foregoing reasons, respondent submits that petitioner was indicted, tried, convicted and sentenced properly and that neither the Eighth nor Fourteenth Amendments to the Constitution was violated in the trial of the petitioner. Therefore, this case should be affirmed.

Respectfully submitted,

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CERTIFICATE

I, David W. Clark, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19 day of December, 1968, I served a copy of the foregoing brief and argument of respondent on writ of certiorari on one [illegible] attorneys for the petitioner, and one of the attorneys for [illegible].A.C.P., Legal Defense and Educational Fund Inc. and National Office for the Rights of the Indigent, by mailing a copy in a duly

addressed envelope to said attorney of record, and amicus curiae as follows:

To: Honorable E. Graham Gibbons
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